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**The FCC May Implement Processing Guidelines For License Renewal Applications
Without A Notice and Comment Proceeding**

I. Questions Presented

May the Federal Communications Commission adopt the Public Interest, Public Airwaves Coalition's (PIPA) proposed processing guidelines without first issuing a notice of proposed rulemaking seeking public comment?

II. Brief Answer

Yes. Although the APA generally requires agencies to provide notice of a proposed rulemaking and afford an opportunity for comment, Congress saw fit to carve out several exemptions to that requirement: "[except] when notice or hearing is required by statute, this subsection does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(A) (2004). PIPA's proposed processing guidelines fall under two of these exceptions: the rules of agency organization and the general statements of policy.

First, the proposed processing guidelines would merely direct the agency's internal operations and therefore constitute rules of agency organization. The guidelines would merely

serve to assist Media Bureau staff to process license renewal applications, and refer appropriate applications to the Commission for further review. The proposed guidelines provide no guidance as to how the Commission should act upon further review. Use of this APA exception to adopt internal procedures is not uncommon. The Commission has used this exception to implement procedure very similar to the processing guidelines. For example, in 1998, the Commission implemented a policy of flagging radio license assignment and transfer applications that could cause competitive problems, without first issuing notice.

Second, the guidelines do not require notice and comment because they fall under an APA exception that authorizes the Commission to adopt policy statements without notice. The proposed guidelines are non-binding and provide the Commission full discretion regarding how to proceed with renewal applications. Licensees that meet all of the guidelines will receive staff level approval of the general public interest portion of their license renewal application, but those who do not are designated for further Commission review. Those licensees designated for further review may nonetheless have their license renewed. The guidelines do not specify any remedies or actions that the Commission would take upon further review. This discretion is the hallmark of a policy statement.

Because the proposed processing guidelines fall under two exceptions to the APA notice and comment requirements, the Commission may adopt the processing guidelines without first issuing a notice of proposed rulemaking.

III. Facts

Broadcast stations must cover issues facing their communities and place lists of programming in the station's public inspection files on a quarterly basis. 47 C.F.R. § 73.3526(e)(11)(i) (2001). This rule stems from Congress' mandate that broadcasters serve the

public interest in its programming; this mandate was reaffirmed in the 1996 Act. *See* 47 U.S.C. § 336(d) (2000). The Public Interest, Public Airwaves Coalition has proposed a set of processing guidelines to assist the Commission in determining whether a station has adequately served the public interest. Ex-Parte Notice of Public Interest, Public Airwaves Coalition, MM Dkt. No. 00-168, filed June 8, 2004 (“PIPA Notice”). The guidelines are comprised of four separate inquiries: the first examines the broadcaster’s commitment to local civic and electoral affairs programming; the second examines independently produced programming; the third ensures that the broadcast station has complied with its reporting requirement; and the fourth examines the amount of commercialization. *Id.* Three hours per week of local civic or electoral affairs programming would satisfy the first factor. *Id.* Independently produced programming that airs for at least twenty-five percent of the primary channel’s prime time schedule would satisfy the second. *Id.* The third inquiry would be satisfied when broadcasters demonstrate they have filed a report identifying the programming that counts towards fulfillment of the processing guideline. *Id.* Finally, staff may process any renewal form that demonstrates the broadcaster has not devoted in excess of 50% of its daily programming to sales presentations and program length commercials. *Id.*

The guidelines do not impose substantive requirements on broadcast stations. Rather, the guidelines would serve to assist staff in processing renewal applications. Licensees that meet all of the guidelines will receive staff level approval of the general public interest portion of their license renewal application, but those who do not may nonetheless have their license renewed. *Id.* Failure to meet all of the guidelines does not result in denial of the renewal application; it results in the application being referred to the Commission for further review. *Id.* The processing guidelines provide no guidance as to how the Commission should act upon further review.

IV. Discussion

The APA generally requires agencies to provide notice of a proposed rulemaking and afford an opportunity for comment. 5 U.S.C. § 553(b) (2004). The APA requirement assures that affected parties can participate in agency rulemaking, *Batterton v. Marshall*, 648 F.2d 694 (D.C. Cir 1980), and ensures that agencies have access to information relevant to the issue before them. *Guardian Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C. Cir 1978). Congress, however, carved out several exemptions to the notice and comment requirement: “[except] when notice or hearing is required by statute, this subsection does not apply to interpretive rules, general statements of policy, or rules of agency organization, procedure or practice.” 5 U.S.C. § 553(b)(A) (2004). The Commission reiterated these exceptions in the Code of Federal Regulations. 47 C.F.R. § 1.412(b)(3)-(b)(5) (2004). The proposed processing guidelines fall under two of these exceptions: the rules of agency organization and the general statements of policy.

A. Because the Processing Guidelines Serve As A Mere Guide For the Review of License Renewals, They Do Not Require Notice and Comment.

The Commission has the authority to adopt procedural rules without notice and comment. This APA exception for the development of agency procedure allows agencies discretion in their internal operations. *American Hospital Ass’n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987).

1. The processing guidelines merely serve as directions for internal agency procedure.

The proposed guidelines are facially procedural. They provide: “[licensees] that meet all four of the following guidelines will receive staff level approval of the general public interest portion of there license renewal application; applications of licensees not meeting all of the following guidelines will be referred to the Commission for review.” PIPA Notice.

The court has upheld almost identical guidelines established by the Occupational Safety and Health Administration (OSHA). In *United States Department of Labor v. Kast Metals Corp.*, 744 F.2d 1145 (5th Cir. 1984), OSHA developed a procedure by which the agency designated employers for health inspections. *Id.* at 1152. The court stated that “[the] creation and use of [the guidelines] to select employers for inspection did not of itself constitute investigation; rather, the plan sets forth procedural steps to guide the agency in its exercise of its statutory authority to conduct inspections.” *Id.* at 1150. Similarly, the proposed processing guidelines set forth steps to guide the Commission in its statutory mandate to ensure that broadcasters serve the public interest.

Any additional burdens of compliance that the guidelines impose upon the broadcasters are incidental. In *Bowen*, the Department of Health and Human Services (HHS) created a similar enforcement strategy. Authority was delegated to a Peer Review Organization (PRO), the function of which was to ensure hospital compliance with the Medicare Act. *Bowen*, 834 F.2d at 1042. When the PRO detected a “significant pattern” of unnecessary admissions in a particular subcategory of medicine, the guidelines instructed the agent to review 100% of hospital admissions in the subcategory. *Id.* at 1050. The *Bowen* court explicitly adopted *Kast Metal*’s rationale and upheld the policy under the procedural exception of the APA. *Id.* at 1049-50. Going further than the court in *Kast Metal*, the *Bowen* court stated that the only burdens upon the parties challenging the HHS guidelines were that it was less likely that their transgressions would go unnoticed and that they had to suffer the incidental inconveniences of compliance. *Id.* at 1051. The court dismissed the first burden as “patently illegitimate;” and the second because derivative burdens do not warrant notice and comment.

Similarly, the proposed processing guidelines help ensure that broadcasters comply with a pre-existing public interest mandate, so the first burden is moot here as well. Second, the objective of the guidelines is to assist the Commission to renew only licensees that serve the public interest; any additional burden imposed upon the broadcasters is derivative of this legitimate procedural intent. Therefore the proposed guidelines do not require notice and comment.

2. The Commission routinely creates procedural rules without a formal rulemaking procedure.

The Commission has a history of implementing procedural rules without notice and comment. For example, in 1998, the Commission adopted a procedure to assist the staff in determining whether radio assignment and transfer applications serve the public interest. *See Broadcast Applications*, Rep. No. 24303 (Aug. 12, 1998); *see also Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19,861, 19,895 (2001)(explaining the procedure adopted in 1998 and reasons for its continued use during pendency of formal rulemaking).¹ The Commission created a 50/70 screen to examine the competitive effects of proposed radio station combinations. Applications proposing a combination that would provide one station group with 50% of the radio advertising revenue share of the relevant market, or two radio station groups with 70%, were “flagged.” *Id.* Flagged applications were not dismissed; they were merely subjected to a further competitive analysis. Similarly, the staff would use the processing guidelines as a screen to “flag” renewal applications

¹ Although the Commission ultimately abandoned this practice, it did not do so because adoption of the process was procedurally infirm. *See Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1075, 1079-88 (1984).

that may not satisfy public interest processing guidelines. The Commission did not initiate a formal rulemaking procedure then, and it need not now.

The Commission also implemented similar guidelines without notice and comment when it delegated authority to the media staff to renew broadcast licenses only if they satisfied certain public interest requirements. *Amendment of Part O of the Commission's Rules—Commission Organization—with Respect to Delegations of Authority to the Chief, Broadcast Bureau*, 43 FCC 2d 638 (1973). For example, TV stations were asked to offer ten percent non-entertainment programming. *Id.* Because the delegations related to internal procedure, it was unnecessary for the Commission to implement the notice and comment provisions of the APA before amending the Code. *Id.* In the same manner, the Commission may modify section 0.283 to delegate authority to the media staff to renew broadcast licenses that have complied with the proposed guidelines. Because this delegation is procedural, the Commission need not provide notice and comment.

Moreover, courts have affirmed the Commission's ability to promulgate procedural rules without notice and comment. In *Meredith Broadcasting Co. v. FCC*, 365 F.2d 912 (D.C. Cir. 1966), the FCC adopted rules that subjected applicants for broadcast licenses to full hearings when the applicants already owned stations in media markets. *Id.* at 913-14.² The court stated that no substantive rule was created by the procedure; it simply provided for an examination in detail of marked applications. *Id.* at 914. Again, the processing guidelines merely refer certain renewal applications to the Commission to ensure the licensee is in compliance with its public interest obligations. Creating internal procedure did not warrant public comment in *Meredith*,

² The rules were implemented as an “interim policy” during a formal rulemaking procedure on media concentration, *id.* at 913, but this was not dispositive to the court's analysis.

and the proposed processing guidelines similarly do not require notice and comment prior to implementation.

B. Because the Processing Guidelines Are Non-Binding Policy Statements, They Do Not Require Notice and Comment.

Congress exempted statements of policy from the notice and comment requirement so agencies could announce how they plan to exercise discretionary power. *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). To determine whether the pronouncement qualifies as a policy statement, courts ask whether decision-makers and officials are free to exercise discretion. *See, e.g., American Bus Ass'n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980). The inability to exercise discretion indicates that the pronouncements are more than mere policy statements; they are binding norms that require notice. If the text is clearly non-binding, the courts do not require notice and comment. *Id.*

The Commission could adopt the processing guidelines as a policy statement because the language provides the Commission with discretion. When a broadcaster does not fulfill the proposed general public interest guidelines, the license renewal application is merely referred to the Commission for further review. The Commission retains full discretion over how to act upon receiving the renewal application. The proposed guidelines are similar to the facts in *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986), which upheld the Secretary of Labor's guidelines regarding when to cite independent contractors for violating safety standards. In *Brock*, the Secretary retained discretion to supersede the guidelines. *Id.* at 538. Here, the proposed processing guidelines are less stringent than those at issue in *Brock* because the proposed guidelines do not provide staff with any authority to "cite" broadcasters who do not comply. The Commission staff is merely directed to refer certain license renewal applications to

the Commission, which retains full discretion over how to proceed. This discretion is the hallmark of a policy statement.

In contrast, courts have pointed to established penalties for violations as proof that standards were substantive rules rather than general policy statements. In *USTA*, the Commission promulgated monetary forfeiture fines with a base forfeiture amount for each type of violation. *USTA v. FCC*, 28 F.2d 1232, 1233 (D.C. Cir. 1994). These standards set forth a detailed schedule of penalties applicable to specific infractions. *Id.* at 1234. The language of the text was so detailed that the Commission could not explain why it published such an exhaustive framework if it intended to allow employee discretion. *Id.* The processing guidelines, however, are distinguishable from the standards examined in *USTA* because the processing guidelines provide no guidance on how the Commission should act. The guidelines do not exist to determine consequences for broadcasters who do not serve the public interest; rather, they exist to assist staff members in determining which licenses require further deliberation. The language of the text reveals this purpose.

The standards in *USTA* are also distinguishable because of their application. Despite the Commission's insistence that it retained discretion to depart from the schedule of fines, the court found that the Commission had done so in only eight cases out of more than 300. *Id.* The vast majority of those eight times were for reasons other than a relaxation of the articulated standards. *Id.* This led to the court's finding that the policy statement was "a rule in masquerade" and therefore required the notice and comment. *Id.* at 1235. A record of strict adherence could never develop as a result of the proposed processing guidelines because they do not provide detailed consequences for infractions; they do not even suggest consequences. *USTA* is inapplicable

because the standards in that case were facially binding and were applied with only minor deviations.

V. Conclusion

Notice and comment are not required when agencies develop internal procedure and policies that have only incidental effect on outside parties. The processing guidelines are procedural; they simply direct the license renewal process and do not impose any specific consequences. The Commission retains full discretion if a renewal application were referred for further review. This discretion is the hallmark of a policy statement. For both of these reasons the Commission may adopt the processing guidelines without notice and comment.